No. 03-364

NOV - 6 2003

In The
Supreme Court of the United States

ZACHARY TAYLOR, AS EXECUTOR OF THE ESTATE OF JACK T. TAYLOR, JR., AND THE TAYLOR FAMILY PARTNERSHIP,

Petitioners,

v.

EUGENE LOBATO, EMILIO LOBATO, JR., MICHAEL J. VIGIL, NORMAN MAESTAS, EUGENE MARTINEZ, CORPUS GALLEGOS BY AND THROUGH HIS CONSERVATOR YVETTE GALLEGOS, AND ZACK BERNAL,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Colorado

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RESPONSE TO PETITIONERS' STATEMENT OF THE PARTIES

The caption on the Petition for a Writ of Certiorari lists only seven of the Plaintiffs that were contained in the caption on the two *Lobato* decisions that are the subject of the Petition. *See* Petition Appendix ("Pet. App.") 1a and 49a.[1] For reasons set forth below, this Court should deny the Petition for a Writ of Certiorari. However, should this Court grant the Petition, Respondents reserve the right to object, including jurisdictional challenges, to any effort by Petitioners to join additional parties that should have been included as parties in the Petition, or to file future petitions as to parties not included in the caption.

[1] Further, Petitioners are aware that two of the parties listed on the caption on the Petition, Corpus Gallegos and Zach Bernal, are deceased and the subject properties are owned by their successors.

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RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

The Respondents submit this Response to Petition for a Writ of Certiorari.[2]

OPINIONS

The listing of opinions in the Petition, pursuant to Sup. Ct. R. 14(d), fails to include the opinions in a related federal action filed by Taylor to enjoin this state court action after the Colorado Supreme Court issued its opinion in *Rael v. Taylor*, 876 P.2d 1210 (Colo. 1994) (hereinafter referenced as the "*Rael* decision.").[3] Rather than filing a timely petition for a writ of certiorari after the *Rael* decision, Taylor made the tactical decision to file a separate federal lawsuit. The ruling of the United States District Court for the District of Colorado in *Taylor v. Jaquez*, Civ. No. 96-Z-776 (D. Colo. August 22, 1996), dismissing that action is not published, but is appended in Respondents' Appendix, (hereinafter "Res. App.") at 9a-14a. The opinion of the Tenth Circuit Court of Appeals affirming the dismissal of that action is reported at *Taylor v. Jaquez*, 126 F.3d 1294 (10th Cir. 1997). Res. App. 1a-8a.

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[2] For ease of reference, the Respondents shall be referenced as "Plaintiffs" and the Petitioners shall be referenced as "Taylor." Jack T. Taylor was the principal defendant when this quiet title action was filed in 1981. After his death, he was succeeded by his son, Zachary Taylor, as estate executor, who subsequently sold the Taylor property to the current owners while the case was pending before the Colorado courts.

[3] *Lobato v. Taylor*, 71 P.3d 938 (Colo. 2002) is hereinafter referenced as "*Lobato I*," and *Lobato v. Taylor*, 70 P.3d 1152 (Colo. 2003) is hereinafter referenced as "*Lobato II*."

This Court's denial of the Petition for Writ of Certiorari in that action is reported at *Taylor v. Jaquez,* 523 U.S. 1005 (1998). Res. App. 15a.

RESPONSE TO STATEMENT OF JURISDICTION

As explained in greater detail below, to the extent that the Petition purports to seek review of claimed errors in the 1994 *Rael* decision, it is untimely. Under the holding of *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975), that decision was a final judgment for the purposes of 28 U.S.C. § 1257. The ninety day time limit for filing the petition set forth in 28 U.S.C. § 2101(c) is mandatory and jurisdictional. *FEC v. NRA Political Victory Fund*, 513 U.S. 88 (1994); *Gibson Distributing Co. v. Downtown Development Ass'n*, 439 U.S. 1000 (1978).

Further, the due process issues that are asserted in the Petition (Questions Nos. 1A and 1B) were never raised by Taylor in his arguments to the Colorado Supreme Court. Therefore, based on the "not pressed or passed upon" rule, this Court does not have appellate jurisdiction under 28 U.S.C. § 1257, or, alternatively, this Court should deny the Petition as a "prudential restriction." *See Illinois v. Gates*, 462 U.S. 213 (1983).

Questions Nos. 2 and 3 in the Petition are not properly raised under 28 U.S.C. § 1257 because the Colorado Supreme Court ruled in favor of Taylor on those issues.[4]

[4] Further, Taylor's argument in Question No. 2 is a change of position from his previous arguments to the Colorado Supreme Court,

(Continued on following page)

See Lobato I in Petitioners' Appendix (hereinafter "Pet. App.") at 58a-59a; *see also* (1) the trial court's summary judgment against Plaintiffs on their claim based on Mexican law, concluding that any rights that the Plaintiffs' predecessors had under Mexican law were extinguished by the 1860 Act of Confirmation, Pet. App. 218a-219a, and (2) decision of the Colorado Court of Appeals, affirming summary judgment on that claim, Pet. App. 179a-184a.

Finally, this Court lacks jurisdiction under 28 U.S.C. § 1257 because Taylor has failed to identify any federal questions. The *Rael* decision was the Colorado Supreme Court's interpretation of the notice provision of a state statute. Pet. App. 153a; Res. App. 7a, 8a. Further, while in *Lobato I* the Colorado Supreme Court denied Plaintiffs' alternative claims under Mexican and international law, it ruled for them on their Colorado state property law claims. Pet. App. 56a-81a. This Court does not have jurisdiction under 28 U.S.C. § 1257 to review the Colorado Supreme Court's state law determinations.

STATEMENT OF THE CASE

A. Introduction

This state court quiet title action arises from a land rights dispute between private landowners in Costilla County, Colorado. The Plaintiffs are successors in title of original Mexican settlers, who, in the nineteenth century,

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and, therefore, there is no jurisdiction for this Court to consider that question.

settled in a region of southern Colorado known as the San Luis Valley.[5] The Petitioners, collectively referenced herein as Taylor, are the former and current owners of a large tract of land known today as the Taylor Ranch,[6] encompassing approximately 80,000 acres located next to Plaintiffs' properties.[7] The trial court in this action made the factual determination that for more than one hundred years after the original Mexican settlement of the San Luis Valley, Plaintiffs' predecessors in title, and then Plaintiffs themselves, continuously exercised their rights to graze their pasture animals, remove timber and gather firewood (hereinafter collectively referenced as "access rights"[8]) on the land that is now known as the Taylor Ranch. Pet. App. 50a, 63a. In the last forty years, since Jack T. Taylor purchased the La Sierra portion of the Taylor Ranch in 1960, and then the Salazar tract in 1973, Taylor has disputed these rights and, in so doing, has attempted to re-write Colorado history. Taylor has argued that, although the rights had admittedly been exercised

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[5] In *Lobato I*, the Colorado Supreme Court concluded that this period of settlement occurred after jurisdiction over this land was ceded by Mexico to the United States in the 1848 Treaty of Guadalupe Hidalgo. Pet. App. 58a, n.4.

[6] The mountainous portion of the Taylor Ranch is commonly referenced as "La Sierra," and a tract of approximately 2,500 acres that is the access point to the mountain is known as the "Salazar tract."

[7] The Plaintiffs' properties are small farms, ranches and town lots in the historic communities adjacent to the Taylor Ranch.

[8] Plaintiffs and their predecessors also hunted, fished and recreated on what is now the Taylor Ranch for over a century. In a well-reasoned, concurring opinion in *Lobato I*, Justice Martinez wrote that, in his view, Plaintiffs established at trial that they were entitled to these rights as well as the rights to graze, timber and gather firewood. Pet. App. 83a-95a.

for over a century, they had been technically extinguished in 1860 by a congressional act (the 1860 Act of Confirmation) that confirmed a Mexican land grant claim of Charles (Carlos) Beaubien. However, three years *after* this Act, Beaubien executed the 1863 Beaubien Document which guaranteed that "all inhabitants will have enjoyment of benefits of pastures, water, firewood and timber, always taking care that one does not injure the other." Pet. App. 52a.[9] In its opinion in *Lobato I*, the Colorado Supreme Court applied state property law to bring reason and history onto the same page.

Question No. 1A in the Petition challenges what Taylor now characterizes as a "novel" application of the Due Process Clause by the Colorado Supreme Court in its 1994 *Rael* decision. However, in the nine years since that opinion was issued, not a single court in the country – state or federal – has issued a published decision criticizing or otherwise disagreeing with it. In short, Taylor argues that this state quiet title action is barred by a previous action filed in 1960 by Jack T. Taylor, under the Colorado Torrens Title Registration Act in the United States District Court for the District of Colorado. In 1986, the trial court in the present litigation agreed with Taylor, granting his motion for summary judgment (Pet. App. 231a), even though Plaintiffs had submitted affidavits and other evidentiary materials which established that, in

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[9] The execution of the Beaubien Document, in 1863, occurred two years after Colorado became a Territory. Before Colorado became a Territory, the property in question was part of the Territory of New Mexico, Pet. App. 252a, which Territory was established in 1850. *Leitensdorfer v. Webb*, 61 U.S. 176, 181 (1857).

1960, Taylor and his Torrens attorney had *actual knowledge* that claims to the access rights were asserted by all landowners in Costilla County, and, yet, Taylor had utilized service by newspaper publication to notify Plaintiffs of the Torrens action. Pet. App. 125a-128a. In *Rael*, the Colorado Supreme Court directly construed the provisions of the Colorado Torrens Title Registration Act, Colo. Rev. Stat. § 38-36-101, *et seq.*, Pet. App. 255a-268a, and concluded as follows:

> When construed together, these sections [of the Colorado Torrens Title Registration Act] disclose the [Colorado] General Assembly's intent to require applicants to exercise reasonable diligence in ascertaining the names and addresses of persons having any interest in the subject property and therefore required to be listed in the application and personally served.

Pet. App. 153a.

Based on this interpretation of Colorado's Torrens Act, the Colorado Supreme Court reversed the summary judgment and remanded the case for a factual determination of whether Taylor exercised reasonable diligence in ascertaining the names and addresses of persons claiming an interest in the subject property. The portion of the *Rael* opinion in which the Colorado Supreme Court considered this Court's prior due process case law was a correct and well-supported analysis. As the evidence before the Court established that Taylor and his attorney had actual knowledge of the claims of all landowners in the county, and that landowners in the county were all readily ascertainable from county tax rolls, this Court's prior due process case law, as well as the state Torrens Act, clearly

precluded service by newspaper publication. *See e.g., Schroeder v. City of New York*, 371 U.S. 208 (1962).

The treatment of the Torrens action in *Lobato II* shows the reasonableness and balance in the Colorado Supreme Court's approach to this case. In that decision, the Colorado Supreme Court partially agreed with Taylor. Applying res judicata,[10] it ruled that the Torrens action barred the claims of any persons who were personally named and served in that action and any persons whose 1960 predecessors in title were personally named and served. Pet. App.25a. However, with respect to those Plaintiffs who were served by newspaper publication or whose 1960 predecessors were served by publication, res judicata does not bar their claims. *Id.* That conclusion was a fact-driven analysis, based on the Colorado Supreme Court's review of the voluminous factual record of this case, which supports the finding that Taylor did not exercise reasonable diligence in ascertaining the names and addresses of persons claiming an interest in the subject property. Pet. App. 16a-25a.

The property law issues decided by the Colorado Supreme Court in favor of the Plaintiffs in *Lobato I* were also based on the application of state law to facts and circumstances that are unique to this case. Questions Nos. 2 and 3 in the Petition purport to raise complex issues of Mexican and international law. However, the Colorado Supreme Court ruled *against* Plaintiffs and in favor of

[10] In *Lobato II*, the Colorado Supreme Court expressed its preference for the term "claim preclusion" but used the term "res judicata" to be consistent with its 1994 decision. Pet. App. 4a.

Taylor on Plaintiffs' claims under Mexican and international law. Pet. App. 58a-59a, 218a-219a, 179a-184a. Although it is unclear in the Petition, the only claims that the Colorado Supreme Court decided for the Plaintiffs were their state law claims for prescriptive easements, easements by estoppel, and easements from prior use. Pet. App. 59a-81a. Those claims are largely based on the factual circumstances surrounding the execution of the Beaubien Document in 1863 – three years *after* the 1860 Act of Confirmation that is the centerpiece of Taylor's argument No. 3 that this case turns on the application of a federal statute. Taylor's principal argument against these state law claims is the factual assertion that the Beaubien Document was intended to grant access rights on lands located elsewhere than on what is now known as the Taylor Ranch. Petition at 13. However, after a full analysis of the record in this case, the Colorado Supreme Court decided that the evidence presented at trial "resolves any doubt that the access rights were meant to burden Taylor's land." Pet. App. 63a-64a. Although the Petition barely mentions the 1863 Beaubien Document, the *Lobato I* decision is, at bottom, an analysis and application of state property law to facts surrounding the execution of that Document and more than one hundred years' usage of the access rights after it was executed. This fact-based, state property law decision does not present any issues that are appropriate for review by this Court.

B. Response to Taylor's Background Statement Regarding Mexican Law and the History of the Sangre de Cristo Grant.

Even though the Colorado Supreme Court denied Plaintiffs' Mexican law claim, Taylor asserts that the

Colorado Supreme Court erred in *Lobato I* and *II* by not applying Mexican law to determine the validity of Plaintiffs' access rights. This is a stunning reversal of position for Taylor, who, throughout the litigation, has asserted that Mexican law and custom do not apply because the Plaintiffs have been unable to establish that Mexican settlers arrived in the San Luis Valley prior to the Treaty of Guadalupe Hidalgo in 1848.[11] Even back in the Torrens action, the Tenth Circuit Court of Appeals' decision was largely based on an interpretation of Colorado property law advocated by Taylor (*Sanchez v. Taylor*, 377 F.2d 733, 737-39 (10th Cir. 1967)) which the Colorado Supreme Court has now found to be incorrect. In any event, if nineteenth century Mexican law and custom were to be applied in this case to determine the validity of the access rights, Plaintiffs would have prevailed on that alternative claim, in addition to their state law claims. The Colorado courts were provided expert legal analysis of nineteenth century Mexican law and custom – never rebutted by Taylor other than by argument of counsel – which established both the validity and enforceability of Plaintiffs' rights under nineteenth century Mexican law.

In sum, Plaintiffs' Mexican law position was based on promises that the original grantees made in their 1843 petition to the Mexican government for the Sangre de Cristo land grant. The grant petition promised that the

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[11] The Colorado Supreme Court accepted Taylor's argument against the Mexican law claim stating: "We agree that landowners cannot claim rights under Mexican law. Their predecessors in title did not settle on the Sangre de Cristo grant until after the land was ceded. . . ." Pet. App. 58a.

original grantees would commence settlement of the grant "until the colony shall be established and permanently fixed, . . ." *See Tameling v. United States Freehold and Emigration Co.*, 93 U.S. 644, 647 (1876). Plaintiffs' experts explained that under Mexican law, this promise required that land be set aside for the communal use of settlers to graze, gather firewood and timber. Pet. App. 64a. In reliance on the belief that these were enforceable rights, Mexican families moved hundreds of miles into the wilderness and, without these rights, these settlers would not have survived. Pet. App. 80a.

Taylor argues that these rights, to the extent they were established under Mexican law, were extinguished because the original Mexican settlers failed to present claims in a process under an 1854 statute designed to comply with the United States' obligation under the Treaty of Guadalupe Hidalgo to protect Mexican land rights. However, when Carlos Beaubien presented his claim to the Sangre de Cristo grant under this statute, he was not seeking to extinguish these settlers' rights. In his petition to the surveyor general, he asserted that he had complied with Mexican law by establishing permanent settlements on the grant. *See Tameling*, 93 U.S. at 654 ("Claimant is prepared further to prove, if deemed necessary, that since the said grant came into his possession he has had made extensive settlements on the same, and that it is becoming under his ownership rapidly populated."). While Plaintiffs and Taylor disagree about the legal effect of the confirmation process on the access rights, that dispute does not present an issue for review by this Court because the

Colorado Supreme Court agreed with Taylor and ruled that Plaintiffs cannot claim the rights under Mexican law. Pet. App. 58a.[12]

C. Response to Taylor's Background Statement Regarding the Torrens Action.

After the access rights had been exercised for more than a century, Jack Taylor purchased the La Sierra portion of the Taylor Ranch in 1960, and he promptly commenced the Torrens action to try to extinguish the rights. Taylor spends two pages of the Petition purporting to explain the Colorado Torrens Act. This discussion neglects to mention that in *Rael*, the Colorado Supreme Court explicitly interpreted this state statute as requiring Torrens applicants to exercise reasonable diligence in ascertaining the names and addresses of persons having any interest in the subject property and personally serving those persons. Pet. App. 153a. The essence of the subsequent *Lobato II* decision was the Colorado Supreme Court's analysis of the factual record of this case, leading to the Court's conclusion that Taylor did not exercise reasonable diligence in ascertaining the names and

[12] In *Tameling*, this Court affirmed the decision of the Colorado Supreme Court that the Sangre de Cristo grant was a valid grant under Mexican law. *See* 2 Colo. 411 (Colo. 1874). That case does not affect Plaintiffs' state law property claims that were the basis of the decision in *Lobato I*. The fact that the Sangre de Cristo grant was a valid grant under Mexican law did not preclude Beaubien from conveying the access rights to Plaintiffs' predecessors after the confirmation process. As well, it did not preclude Plaintiffs from acquiring the rights by prescription based on undisputed continuous use for more than a century after the confirmation process.

addresses of persons having claims to the access rights on the Taylor Ranch. This determination was a factual analysis, based on Taylor's and his attorney's knowledge that all landowners in Costilla County[13] had claims to the disputed access rights and that the identity of every landowner in the county was readily ascertainable from county tax rolls.

As set forth in both *Rael* and *Lobato II*, the record in this case is replete with evidence that supports this factual determination. First, Taylor knew from the Beaubien Document, the 1864 Gilpin Agreement (in which Beaubien's immediate successor agreed to recognize the access rights) and Taylor's own deed that landowners in Costilla County had an interest in the Taylor Ranch. Pet. App. 17a-18a, 125a-126a. Second, the lawyer who represented Taylor in the Torrens action had previously represented Costilla County landowners and had written a formal opinion letter rendering the opinion that landowners were entitled to the rights by virtue of their status as landowners. Pet. App.18a, 127a.[14] Third, the

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[13] The boundaries of Costilla County roughly encompass the same area that was the Colorado portion of the Sangre de Cristo grant.

[14] Taylor's lawyer in the Torrens action published an interview in 1998 in which he acknowledged that the 1960 Torrens action was filed in federal district court in Denver – roughly 250 miles from Costilla County – to avoid "possible conflicts." Pet. App. 19a; *see* Tom Faxon, "An Oral History: Raphael J. Moses," *The Colorado Lawyer*, March 1998, Vol. 27, No. 3, 115. That published interview disclosed an ex parte meeting between Taylor's Torrens attorney and a federal judge in Denver to develop the legal strategy for bringing the case in federal court. That same judge later signed the order for service by newspaper publication. It also reveals other conflicts that further tainted the Torrens action.

court-appointed examiner of title issued a report as part of the record in the Torrens action stating that the rights were claimed by *"all owners of land in Costilla County."* Pet. App. 19a, 126a-127a.

In addition to this evidence, the record in this case contains the actual 1959 and 1960 Costilla County tax rolls from the County Assessor's Office. Pet. App. 23a ("According to the record, the Costilla County tax rolls provided the names and addresses of every landowner in Costilla County."). Based on an exhaustive study of the record, the Colorado Supreme Court determined in *Lobato II* that, as a whole, when taking into account expert testimony and information at Taylor's disposal at the time he filed his Torrens application, Taylor did not exercise reasonable diligence in ascertaining the names and addresses of persons having claims to the access rights on the Taylor Ranch. Pet. App. 25a.

Finally, with regard to the original Torrens action, this Court should note that the United States District Court for the District of Colorado and the Tenth Circuit Court of Appeals decided the case based, in part, on federal law and, in part, on Colorado property law. *See Sanchez v. Taylor*, 377 F.2d 733. In *Lobato I,* the Colorado Supreme Court agreed with the federal courts' analyses of federal law, but differed with those courts' application of state law, both in the analysis of the Beaubien Document and in the application of the Colorado law of prescription.

D. Response to Taylor's Background Statement Regarding the Proceedings.

In his discussion of the "proceedings below" (Petition at 11), Taylor describes the *Rael* decision, without

explaining that, at its core, that decision is the Colorado Supreme Court's interpretation of a Colorado statute. Pet. App. 153a. The Colorado Supreme Court did not rule that any provision of the Colorado Torrens Act is unconstitutional. To the extent that it took into account due process considerations in construing the state legislature's inclusion of notice requirements in the Colorado Torrens Act, the Colorado Supreme Court properly understood this Court's due process case law.

While the *Rael* decision does not raise any constitutional issues that are appropriate for review by this Court, the due process issues that the Petition now seeks to raise are all issues that should have been pursued in 1994. Taylor's case statement does not mention that, rather than filing a petition for writ of certiorari at that time,[15] Taylor filed a separate federal lawsuit to enjoin the Colorado courts from proceeding with the remand. In dismissing the *Taylor v. Jaquez* action, the Honorable Zita L. Weinshienk, of the United States District Court for the State of Colorado, stated as follows:

> . . . [T]he issue is whether we've got an important state interest here that has to be decided and should therefore require this court to abstain in favor of letting the state decide some of these issues.
>
> It appears to me that in these areas that have been pointed out, the access to courts for

[15] Both the United States District Court for the District of Colorado and the Tenth Circuit Court of Appeals specifically noted in their *Jaquez* decisions that Taylor had failed to timely seek review of the *Rael* decision by this Court. Res. App. 3a, 11a.

> state citizens, the interpretation of the state Torrens Act as it goes to notification, who should be notified and how they should be notified in this type of action – these are indeed important state issues. But perhaps the – one of the most important state issues in this court's view is the – is the state citizen's access to state lands and the issues concerning access to land, and the state interest in access to the land is a great state issue, certainly isn't a federal issue, unless we've got federal parks involved.
>
> But in all of these areas, the access to courts, the access to lands, the interpretation of Torrens as it goes to notification of parties, all of these, it seems to me, involve strong state issues. And basically, I think this is what the Colorado Supreme Court said. And they did not take their ruling lightly. They gave the decision more than 20 pages of discussion, so it was something which has been very deeply considered by the Colorado Supreme Court.

Res. App. 12a.

In its review of the dismissal, the Tenth Circuit Court of Appeals – which had also issued the final decision in the Torrens action that Taylor sought to enforce – echoed Judge Weinshienk's conclusion that this case raises compelling state interests that should be decided by Colorado courts. Res. App. 7a-8a. Finally, this Court then denied Taylor's petition for writ of certiorari, seeking review of the Tenth Circuit's unfavorable *Jaquez* decision. Res. App. 15a.

After the remand to Costilla County district court following the *Rael* decision, over Plaintiffs' objections, there were two separate trials – one on the adequacy of

publication notice in the Torrens action[16] and the other on the merits of Plaintiffs' claims. Taylor was given every opportunity to present whatever evidence he had in support of his positions.

When the case returned to the Colorado Supreme Court for *Lobato I*, initially the only issue before the Court was review of the rulings against Plaintiffs on the merits of their three property law claims – a claim based on the Beaubien Document, a claim based on Colorado law of servitudes, and a claim based on Mexican and international law. With respect to the first two claims, the only arguments asserted by Taylor were based on the application of Colorado law to the evidence in the extensive record of this case. Taylor did not argue – as he does now – that Mexican law and the 1860 Act of Confirmation somehow bar these state law claims.

In *Lobato I*, after determining, based on its review of the evidence, that Plaintiffs prevailed on their state law claims, the Colorado Supreme Court elected to retain jurisdiction to resolve Plaintiffs' remaining issues on appeal regarding the misapplication of res judicata by the trial court. The Court stated: "As a matter of judicial economy, and as a matter of fairness, given the forty-one year denial of access to the Taylor Ranch and this twenty-one year litigation, we decline to remand this case to the court of appeals for a determination of this issue." Pet. App. 82a.

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[16] The trial court also considered the adequacy of service by publication in the 1960 Salazar quiet title action in state district court in Costilla County.

In his brief to the Colorado Supreme Court pertaining to *Lobato II*, Taylor did not argue, as he now asserts in the Petition, that the *Rael* decision was an erroneous analysis of due process. Instead, he argued that the trial court properly applied the *Rael* test by determining that Taylor exercised reasonable diligence except in his failure to name and serve those Plaintiffs (or their 1960 predecessors in title) who were identifiable from grazing activity on Taylor Ranch that was easily discernible from a visible inspection of his land in 1960.

Following *Lobato II*, the Colorado Supreme Court denied Taylor's petition for rehearing and Taylor's separate motion for recall and stay of mandate. After twenty-two years of litigation, this case is now in its final stage of resolution in the Costilla County district court.

ARGUMENT

A. The Petition Is Untimely to the Extent That It Seeks Review of the *Rael* Decision.

The time limit for seeking Supreme Court review in civil cases is mandatory and jurisdictional. 28 U.S.C. § 2101(c); *FEC v. NRA Political Victory Fund*, 513 U.S. 88; *Gibson Distributing Co. v. Downtown Development Ass'n*, 439 U.S. 1000 (1978). Pursuant to 28 U.S.C. § 2101(c), a petition for a writ of certiorari must be filed within ninety days of a judgment or decree. The *Rael* decision, rendered in 1994, was clearly a judgment or decree within the meaning of this statute, and, therefore, to the extent that the Petition seeks review of that decision, it is barred.

In *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, this Court determined when a state court decision is a final judgment

under 28 U.S.C. § 1257 for purposes of seeking Supreme Court review. This Court included, as final judgments:

> . . . those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on nonfederal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation.

420 U.S. 469, 482-3.

Clearly, to the extent the *Rael* decision involved federal due process issues that Taylor now raises in his Petition, under *Cox Broad. Corp. v. Cohn*, it was a final decision that should have been appealed in 1994.[17] After missing the opportunity to file a petition nine years ago, Taylor made the tactical decision to file the *Taylor v.*

[17] The *Rael* decision, which was clearly "final" under *Cox*, is distinguishable from *Hathorn v. Lovorn*, 457 U.S. 255 (1982), in which the earlier decision of the Missouri Supreme Court was not a final decision.

Jaquez action. In dismissing that case in 1996, Judge Weinshienk stated as follows:

> And it seems to me that the way this is normally done – and I'm not going to say that it should have been done because there may have been many reasons why it was not – is that if plaintiff did not – plaintiffs did not like the decision in *Rael v. Taylor* – and let's make sure we've got that on record: 876 P.2d 1210, which is the 1994 Colorado case, the Supreme Court of Colorado – it should have been appealed.

Res. App. 11a. The Tenth Circuit Court of Appeals also noted that Taylor had failed to seek review of the *Rael* decision. Res. App. 3a.

As stated by this Court in *Cox* at 478: "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice.'" Certainly, the history of this litigation shows the wisdom of that policy. Since the *Rael* decision, this case has been litigated for nine years, in both the Colorado state and federal court systems, with full appellate review of every trial court determination. To now allow Supreme Court review of the 1994 Colorado decision would encourage enormous inefficiencies that the mandatory and jurisdictional time requirement of 28 U.S.C. § 2101(c) is designed to avoid.

B. The Petition Should Be Denied Because it Seeks Review of Due Process Issues That Were Not Pressed or Passed upon in the Colorado Supreme Court.

"Comity to the States, and . . . a constellation of practical considerations" cause this Court to review only issues that were pressed or passed upon by state courts. *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79 (1988). To meet this threshold, the issues asserted in a petition for a writ of certiorari must have been raised or squarely considered and resolved by the state court. *Illinois v. Gates*, 462 U.S. at 218 n.1; *Cardinale v. Louisiana*, 394 U.S. 437 (1969). In this case, Taylor raises two due process issues that were neither pressed nor passed upon by the Colorado Supreme Court, and, therefore, the Petition should be denied.

1. Taylor Did Not Argue That the Colorado Supreme Court Should Not Have Considered Whether Taylor and His Torrens Attorney Had Exercised Due Diligence to Ascertain the Identities of Interested Parties In Determining the Effectiveness of Newspaper Publication in the Torrens Action.

Taylor's first due process issue (Petition at 18) is based on the assertion that, in the *Rael* decision, the Colorado Supreme Court erred in considering whether Taylor and his attorney had exercised due diligence to ascertain the identities of interested parties in evaluating the effectiveness of the service by newspaper publication. However, Taylor never made this argument to the Colorado Supreme Court. The Petition principally relies upon

an asserted conflict between *Rael* and this Court's decisions in *Green v. Lindsey*, 456 U.S. 444 (1982) and *American Land Co. v. Zeiss*, 219 U.S. 47 (1911), yet neither of those two cases were even cited in Taylor's briefing in *Rael*. Although Taylor referenced the *Zeiss* decision in passing during his briefing in *Lobato II,* his arguments presented there were that the trial court had properly applied the *Rael* test, without challenging the propriety of the test itself. This due process issue that Taylor now frames for review by this Court was never pressed by him in the proceedings in the Colorado Supreme Court.

2. Taylor Did Not Argue to the Colorado Supreme Court That a Successor Cannot Assert the Due Process Rights of a Prior Landowner.

Likewise, the second due process issue now framed by Taylor for review by this Court was never argued to nor considered by the Colorado Supreme Court. The Petition states that there is "a deep and mature 4-2 split over this important issue of constitutional law." Petition at 25. This portion of the Petition cites 10 cases – and not one of them was cited in all of the briefing before the Colorado Supreme Court. Nor do the Colorado Supreme Court opinions in any way address this issue. Based on the "not pressed or passed upon" doctrine, this Court lacks jurisdiction to review this issue, or alternatively should decline to utilize

this case, where the issue has never been addressed, as a vehicle for now considering it.[18]

C. The Colorado Supreme Court Properly Decided That Taylor Did Not Comply with the Notice Provisions of the Colorado Torrens Title Registration Act.

The linchpin of Taylor's due process argument is that, in determining the validity of the service by publication in the Torrens Act, the Colorado courts in this litigation should have looked only to the notice provisions of the state statute and not to the reasonableness of Taylor's conduct in failing to identify persons that claimed the access rights. This argument fundamentally misapprehends the *Rael* decision. In *Rael,* the Colorado Supreme Court construed the Colorado Torrens Act and determined

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[18] In any event, the four cases that are asserted to establish Taylor's argument are either flawed because of misplaced reliance or else they are readily distinguishable from the *Rael* decision. *Kemmerer Coal Co. v. Brigham Young University*, 723 F.2d 54 (10th Cir. 1983) and *Shelledy v. Lore*, 836 P.2d 786 (Utah 1992) were decided based on statutes of limitation under Utah law. In the case at bar, the Colorado courts have squarely rejected all of Taylor's failed statutes of limitation arguments. In *United States v. Haddon*, 550 F.2d 677 (1st Cir. 1977), the discussion of due process right of predecessors was dicta in a case that turned on the condemnor's compliance with the notice provisions of the statute at issue. In the case at bar, the Colorado Supreme Court determined that Taylor did not comply with the notice provisions of the Colorado Torrens Act. Finally, *Hewitt v. Glaser Land & Livestock Co.*, 626 P.2d 268 (Nev. 1981) is factually distinguishable because it involved a prior case where the predecessor lost his title after his property was attached and executed upon by a judgment creditor. In contrast, in the present case, the Plaintiffs' predecessors had exercised rights for over a century and then – without any notice – those rights were purportedly extinguished in the Torrens action.

that the Colorado General Assembly intended to "require [Torrens] applicants to exercise reasonable diligence in ascertaining the names and addresses of persons having any interest in the subject property and therefore required to be listed in the application and personally served." Pet. App. 153a. Since this decision is a state court's construction of a state statute, the Petition fails to state grounds for review under 28 U.S.C. § 1257.

D. The Decisions of the Colorado Supreme Court Do Not Conflict with this Court's Due Process Decisions.

At its core, the *Rael* decision was the Colorado Supreme Court's interpretation of a Colorado statute. After deciding, in *Rael*, that the notice provisions of the Colorado Torrens Act require Colorado Torrens applicants to exercise reasonable diligence in ascertaining the names and addresses of persons having any interest in the subject property, the Court in *Lobato II* examined the extensive trial record and concluded that Taylor failed to meet this standard. The record in this case amply supports the conclusion that Taylor knew that claims to the access rights were asserted by all landowners in Costilla County and that all landowners in the county were readily ascertainable from county tax rolls. His own attorney had previously rendered a legal opinion that supports that conclusion, and the court-appointed title examiner stated in his report that claims were asserted by all landowners in the county. The inadequacy of service by newspaper publication under these circumstances is firmly supported by *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and its progeny. *See Walker v. City of Hutchinson*, 352 U.S. 112 (1956); *Schroeder v. City of New York*,

371 U.S. 208 (1962); *Greene v. Lindsey,* 456 U.S. 444; *Mennonite Bd. of Missions v. Adams,* 462 U.S. 791 (1983). Had the Colorado Supreme Court ruled, as Taylor now argues, that Taylor's own lack of due diligence should not be considered in determining the validity of service by publication, the very essence of due process would have been turned on its head. There is no conflict between the *Rael* or *Lobato* decisions and this Court's well-developed body of law addressing due process in the context of service by newspaper publication.

E. The Second and Third Questions Do Not Present Any Issues for Review Because the Colorado Supreme Court Ruled Against Plaintiffs on Their Mexican Law Claim.

There are no federal questions for this Court to consider with respect to the Colorado Supreme Court's determination of the merits of this case. The second and third issues set forth in the Petition are not properly raised because in *Lobato I* the Colorado Supreme Court ruled against the Plaintiffs on their Mexican law claim. In *Lobato I,* the Colorado Supreme Court reviewed the extensive record of this case and applied Colorado property law to conclude that Plaintiffs have established their access rights. This opinion is precisely what the federal courts in *Taylor v. Jaquez* concluded should be left to the Colorado courts to decide.

F. Supreme Court Review in this Case Would Add Another Unnecessary Layer of Appellate Litigation That Would Delay Final Resolution and Cause Injustice to Plaintiffs.

This Court should not grant the Petition because to do so would result in even more unnecessary delay and expense in litigation that has been pending for over twenty years. In reaching its decisions in this case, the Colorado Supreme Court carefully considered factual history that is unique to Colorado. The Court recognized that a grave injustice has been perpetrated against the Plaintiffs, who are from a historic community located in the poorest part of the poorest county in Colorado. In *Lobato I*, the Colorado Supreme Court took the extraordinary measure of retaining jurisdiction to address the issues decided in *Lobato II* so that further delay in these proceedings could be avoided. Pet. App. 82a.

For their part, Petitioners, who are among the wealthiest landowners in Colorado, have used every procedural device that money can buy to derail this litigation. For twenty years Petitioners vigorously pursued meritless Rule 11 sanctions in satellite proceedings, appealing the denial of sanctions to the Colorado Supreme Court in *Rael* (Pet. App. 156a), and then persisting with their sanctions campaign even after the *Rael* decision, up through the appellate decision that preceded *Lobato I*. Pet. App. 199a. On a separate track, after *Rael*, Petitioners initiated and pursued the *Taylor v. Jaquez* action through the federal courts, up through a petition for a writ of certiorari. Res. App. 15a. At the same time, in Costilla County District Court, Taylor demanded bifurcated proceedings that further delayed resolution and added unnecessary layers of litigation expense. This Court should not

reward tactics that have the effect of making this litigation as lengthy, cumbersome and expensive as possible.

In the final analysis, U. S. Supreme Court review in this case would not be appropriate because the Colorado Supreme Court's decisions in *Rael* and *Lobato I* and *II* are carefully considered and well-reasoned opinions, based on state law, that reach a proper result. Plaintiffs and their predecessors exercised the access rights for more than a century until Taylor bought his ranch and then commenced his efforts to re-write history. The Colorado Supreme Court has properly determined that the unique facts and circumstances of this case, considered through the lens of Colorado property law, compel the conclusion that Plaintiffs have established their access rights. While this result is far-reaching in its implications for the Plaintiffs, its precedential effect and potential impact on other land titles is limited because of the unusual factual context in which the case arises. In short, there are no good reasons for this Court to grant the Petition. Instead of adding further delay and expense of an appeal, in which this Court would surely affirm the decisions of the Colorado Supreme Court, this Court should leave these state court proceedings to continue to their conclusion.

CONCLUSION

For the foregoing reasons, the Petition should be denied.

Respectfully submitted,

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November 6, 2003

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT FILED OCTOBER 10, 1997

No. 96-1426

ZACHARY TAYLOR, as Executor of the Estate of Jack T. Taylor, Jr., deceased; TAYLOR FAMILY PARTNERSHIP,

Plaintiffs-Appellants,

v.

CHARLIE JAQUEZ, JR.; PETE E. ESPINOZA, ELMER MANUEL ESPINOZA, JOE A. GALLEGOS, ROBERT ROMERO, Individually and as representatives of a proposed class of some 110 plaintiffs in civil action No. 81CV5 now pending in the District Court of Costilla County, Colorado,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO (D.C. No. 96-Z-776)

Albert B. Wolf, Wolf & Slatkin, P.C., Denver, CO, for Plaintiffs-Appellants.

Jerry P. Gordon, Esq. (Jeffrey A. Goldstein, Esq., Denver, CO, and Watson W. Galleher, Esq., Don, Hiller & Galleher, PC, Denver, CO, with him on the briefs), Boulder, CO, for Defendants-Appellees.

Before **PORFILIO, ANDERSON,** and **BALDOCK,** Circuit Judges.

PORFILIO, Circuit Judge.

This appeal presents the question of whether the United States District Court of the District of Colorado properly abstained from enforcing a judgment entered in a federal quiet title action because of pending state court litigation over the rights of individuals challenging appellants' interest in the land. We conclude these circumstances require abstention by federal courts and affirm the judgment of dismissal.

I. BACKGROUND

In the beginning, the 77,524 acre Taylor Ranch was part of an 1844 grant of a million acres of land bestowed by the Mexican governor of New Mexico upon Narcisco Beaubien and Stephen Luis Lee.[1] After the grantees' deaths, much of the land in the Sangre de Cristo Grant, particularly parcels in an area designated the Rito Seco, were conveyed, although the land at issue here, "La Sierra," the Mountain Tract, was not sold until 1960 when Jack Taylor, a resident of North Carolina, purchased it. Located southwest of the town of San Luis in Costilla County, Colorado, the tract contains the only privately owned 14,000 foot mountain in the state. Mr. Taylor's deed to La Sierra recognized all existing rights-of-way and was "also subject to claims of the local people by prescription or otherwise to right to pasture, wood, and lumber and so-called settlements [sic] rights in, to and upon said land, but not subject to rights granted by the party of the first

[1] A more comprehensive history is detailed in ***Rael v. Taylor,*** 876 P.2d 1210 (Colo. 1994).

part or its predecessors from and after January 1, 1900. . . . " ***Rael v. Taylor,*** 876 P.2d 1210, 1214 (Colo. 1994) (***Rael***). The representation and substance of the "claims of the local people" dating back to the original grant impel the litigation presently pending in the state district court of Costilla County albeit the federal court's order quieting title granted to Jack Taylor in his 1960 Torrens Title Registration diversity action. ***Sanchez v. Taylor,*** 377 F.2d 733 (10th Cir. 1967) (***Taylor I***).

To preserve that judgment, Zachary Taylor, as Executor of the Estate of Jack C. Taylor, and the Taylor Family Partnership (Taylor, collectively) filed the present action, ***Taylor II,*** under 28 U.S.C. § 2283 in the United States District Court for the district of Colorado to enjoin the 110 plaintiffs in the Costilla County lawsuit from attacking the validity of the Final Decree of Confirmation of Title and Registration entered in 1965 (the Decree). The Decree had become imperiled by a 1994 Colorado Supreme Court decision which construed the notice requirements of the Colorado Torrens Title Act and concluded, as a matter of state law, the 1960 federal action may not have provided constitutionally adequate publication notice sufficient to constitute a binding judgment on those not served. The Colorado Supreme Court thus reversed a state court order dismissing the case on res judicata grounds and remanded for resolution of the factual issues surrounding plaintiffs' due process claims. ***Rael,*** 876 P.2d at 1227. Taylor did not seek further review of that decision, and it now stands as the law of the case.

As such, defendants here, as individuals and class representatives of "some 110 Plaintiffs in Civil Action No. 81CV5 now pending in the District Court of Costilla County, Colorado," moved to dismiss ***Taylor II*** under Fed.

R. Civ. P. 12(b)(6) on the grounds that *Younger* abstention, ***Younger v. Harris,*** 401 U.S. 37 (1971), application of the principles of ***Parsons Steel, Inc. v. First Alabama Bank,*** 474 U.S. 518 (1986), and the sound policies underlying the Anti-Injunction Act compel a federal court to avoid interfering with pending state proceedings.

At the close of a hearing, the district court ruled from the bench after converting the motion to dismiss into one for summary judgment under Fed. R. Civ. P. 56(c) because matters outside the pleadings had been presented. The court agreed two of the requisites for *Younger* abstention were present, the parties having conceded there are ongoing state proceedings and Taylor has an opportunity to raise his federal claims in that forum. It further concluded, as a matter of law, important state interests involving the access to the courts for state citizens, the interpretation of the notification provisions of the Colorado Torrens Act, the state's interest in access to lands, and citizens' access to state lands precluded it from adjudicating the claim before it. In addition, the court held ***Rael*** explicitly determined the preclusive effect of the state judgment, and on that basis, the principles of federalism and comity articulated in *Parsons Steel, Inc.* demanded noninterference. Summary judgment of dismissal was entered, and Taylor appealed.

II. STANDARD OF REVIEW

Although what the district court did amounts to denying a preliminary injunction, an order we review for abuse of discretion, ***Lundgrin v. Claytor,*** 619 F.2d 61, 63 (10th Cir. 1980), more precisely, we have before us a motion for dismissal under Fed. R. Civ. P. 56(c) which is

predicated on *Younger* abstention. We have not previously addressed the applicable standard of review[2] although other circuits have and provide guidance. Recognizing the elusiveness of the standard often applied to review *Younger* abstention, the Seventh Circuit observed because "application of the *Younger* doctrine is absolute . . . when a case meets the *Younger* criteria," there is no discretion for the district court to exercise. ***Trust & Inv. Advisers, Inc. v. Hogsett,*** 43 F.3d 290, 294 (7th Cir. 1994). Review, therefore, of the decision to abstain is *de novo,* the Seventh Circuit held. We agree. Although positioned on the tip of Rule 56(c) which also merits plenary review, that examination is sharpened by the legal determination of whether the requisites of *Younger* abstention have been satisfied. *See also* ***Brooks v. New Hampshire Supreme Court,*** 80 F.3d 633, 637 (1st Cir. 1996); ***Kenneally v. Lungren,*** 967 F.2d 329, 331 (9th Cir. 1992), *cert. denied,* 506 U.S. 1054 (1993); ***Traughber v. Beauchane,*** 760 F.2d 673, 675-76 (6th Cir. 1985). To insure they have, we must be sensitive to the competing tension between protecting federal jurisdiction and honoring principles of Our Federalism and comity. Our review therefore is *de novo.*

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[2] In ***Ramos v. Lamm,*** 639 F.2d 559, 564 n.4 (10th Cir. 1980), the court described the decision to abstain as "largely committed to the discretion of the district court," in concluding "there was no error or abuse of discretion by the district court in declining to abstain from hearing this constitutional case. . . . " ***Id.*** at 565. We thus affirmed the exercise of jurisdiction based on the final judgment for injunctive relief the district court had entered under Fed. R. Civ. P. 54(b).

III. *YOUNGER* ABSTENTION

"Since the beginning of this country's history Congress has, subject to few exceptions, manifested a desire to permit state courts to try state cases free from interference by federal courts." **Younger v. Harris**, 401 U.S. 37, 43 (1971). To assure this end, *Younger* articulated a narrow exception now applied to state criminal, ***Younger***, 401 U.S. at 37; civil, ***New Orleans Public Serv., Inc. v. Council of City of New Orleans***, 491 U.S. 350 (1989); or administrative proceedings, ***Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.***, 477 U.S. 619 (1986), which commands a federal court to abstain from exercising jurisdiction when three conditions have been established. First, there must be ongoing state criminal, civil, or administrative proceedings. Second, the state court must offer an adequate forum to hear the federal plaintiff's claims from the federal lawsuit. Third, the state proceeding must involve important state interests, matters which traditionally look to state law for their resolution or implicate separately articulated state policies. ***Seneca-Cayuga Tribe of Oklahoma v. State of Oklahoma ex rel. Thompson***, 874 F.2d 709, 711 (10th Cir. 1989). In this case, the parties agree the first two requisites are present. However, the absence of the third element of an important state interest presented, Taylor contends, requires the district court to exercise jurisdiction and grant injunctive relief.

Taylor portrays the state proceeding as one involving "only claims of private individuals to engage in activities upon the privately-owned land of the Taylor Family." Based on this characterization, Taylor urges state citizens' access to the courts, resolution of property claims, and access to land are not cognizable for *Younger* abstention

and would render meaningless the relitigation exception to the Anti-Injunction Act. 28 U.S.C. § 2283. Instead, Taylor maintains, we should enforce the thirty-two year old judgment quieting title based on application of ***Mullane v. Central Hanover Bank & Trust Co.,*** 339 U.S. 306 (1950), which ascertained that constitutionally sufficient notice was afforded all interested parties.

Nonetheless, it is critical to recognize the prior federal action was premised on diversity jurisdiction in which Jack Taylor, a resident of North Carolina, notified citizens residing around his property in southern Colorado of his intention to register his title to the 77,524 acre tract in compliance with the statutory scheme set out in Colorado's Torrens Title Registration Act, now codified at Colo. Rev. Stat. §§ 38-36-101 through 38-36-198 (1982 & 1993 Supp.). The federal court applied state law in that action and principally focussed on whether the alleged prescriptive rights of defendants vested any legal rights in them adverse to establishing Taylor's clear title. In that decision, the court made only passing reference to the question of notice, indicating the number of residents served and the defendants against whom default judgments were entered for failure to respond to interrogatories. ***Taylor I,*** 377 F.2d at 734. However, since that decision, the Colorado Supreme Court has comprehensively addressed the Torrens Act's notice requirements and ordered the state trial court to apply its announced prescription in proceedings the Supreme Court held were improperly dismissed. ***Rael,*** 876 P.2d at 1210. As the federal district court noted here, what more important state interest is there for the state court to address than the enforcement of its method of registering good title to privately owned lands within the state. That individual citizens may raise these issues does

not transform the state interest into a private one. As the Court observed in ***Pennzoil Co. v. Texaco, Inc.***, 481 U.S. 1, 13 (1987), "the importance to the States of enforcing the orders and judgments of their courts" represents an important state interest in administering certain aspects of their judicial systems. Under these circumstances, to ignore the pronouncement of the Colorado Supreme Court by enjoining the very proceeding it reinstated to determine whether state law was properly followed would intolerably interfere with the judgments of state courts.

Moreover, contrary to Taylor's suggestion, the state court is surely competent to decide whether the notice requirements of the Torrens Act were satisfied as to those plaintiffs presently challenging the prior action. Indeed, ***Rael*** demands the federal plaintiffs receive a full and fair opportunity to litigate the constitutional claim of due process.

IV. CONCLUSION

Our conclusion that *Younger* abstention applies ends the matter. It was unnecessary for the district court to couch dismissal on the additional ground of the preclusive effect of the state court judgment. When equitable restraint is warranted, we defer to the state proceeding. We therefore **AFFIRM** the order dismissing the action based on *Younger* abstention.

APPENDIX B

EXCERPTED HEARING ON MOTION TO DISMISS OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AUGUST 22, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 96-Z-776

ZACHARY TAYLOR, *et al.*,

Plaintiffs,

vs.

CHARLIE JAQUEZ, JR., *et al.*,

Defendants.

REPORTER'S TRANSCRIPT
(Hearing on Motion to Dismiss)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 8:50 a.m., on the 22nd day of August, 1996, Courtroom C-400, United States Courthouse, Denver, Colorado.

APPEARANCES

ALBERT B. WOLF and RAYMOND P. MICKLEWRIGHT Attorneys at Law, 745 Ptarmigan Place, 3773 Cherry Creek North Drive, Denver, Colorado, 80209, appearing for the plaintiffs.

WILLIAM F. SCHOEBERLEIN, Attorney at Law, 950 17th Street, Suite 1600, Denver, Colorado, 80202, appearing for the defendants.

* * *

[33] We'd ask the Court to issue an order which will dismiss this action, allow the action in the county of Costilla to proceed. And we believe that it's probably appropriate to issue that order pursuant both to Rule 12 and to Rule 56.

Thank you very much, your Honor.

THE COURT: If the Court had indicated this as a motion for summary judgment under 56, would there have been anything else that would have been presented I think we've had an considered many attachments on both sides.

MR. WOLF: The only matter is if the Court would have a question with respect to irreparable damage or irreparable harm, we would submit some more information to the Court, if the Court were to make an adverse determination based upon that issue.

THE COURT: Yes. If we get to the preliminary injunction issue, then certainly that must be shown.

MR. WOLF: Sure.

RULING

THE COURT: Well, the argument has been very forcefully made on both sides, both by the written material and verbally here in court. And apparently there is certainly considerable interest, judging from a few visitors to the courtroom. And I hope that the quality, the high quality of this argument certainly shows to those that are listening that [34] the legal profession certainly does take matters such as this very seriously and that this matter has been very fully briefed and fully argued.

I'm concerned about this case, because what we basically have is a decision of the Colorado Supreme Court. It was not appealed. There is no request for *cert.* by the plaintiffs. And basically what the plaintiffs have done is come into the Federal Court and asked the Federal Court to second guess the Colorado Supreme Court, and the same issues that were presented to the Colorado Supreme Court.

And it seems to me that indeed the way this normally is done – and I'm not going to say should have been done in this case because there may have been many reasons why it was not – is that if plaintiff did not –plaintiffs did not like the decision in **Rael vs. Taylor** – and let make sure we've got that on the record: 876 P.2d 1210, which is a 1994 Colorado case, the Supreme Court of Colorado – it should have been appealed.

The case now is before this court, and the motion to dismiss is on two major areas. One is **Younger** abstention and the other is pursuant to the Anti-Injunction Act, which is a federal act, saying that federal courts do not enjoin state coverts in the – and the circumstances are there in the exception, basically to protect its own judgment, the relitigation exception which has been discussed.

[35] And the **Parsons Steel** case examines the tension between the relitigation exception and the Full Faith and Credit Act and provides what the Supreme Court of the United States says is a way of reading both of these consistently.

First of all, looking at **Younger**, it is pretty much admitted that there is an ongoing state court proceeding and that there is opportunity to raise the federal claims in the state court proceeding; and the issue is whether we've

got an important state interest here that has to be decided and should therefore require this court to abstain in favor of letting the state decide some of these issues.

It appears to me that in these areas that have been pointed out, the access to courts for state citizens, the interpretation of the state Torrens Act as it goes to notification, who should be notified and how they should be notified in this type of action – these are indeed important state issues. But perhaps the – one of the most important state issues in this court's view is the – is the state citizen's access to state lands and the issues concerning access to land, and the state interest in access to the land is a great state issue, certainly isn't a federal issue, unless we've got federal parks involved.

But in all of these areas, the access to courts, the access to lands, the interpretation of Torrens as it goes to notification of parties, all of these, it seems to me, involve [36] strong state issues. And basically, I think this is what the Colorado Supreme Court said. And they did not take their ruling lightly. They gave the decision more than 20 pages of discussion, so it was something which has been very deeply considered by the Colorado Supreme Court.

Therefore, it would seem to me that on the basis of **Younger**, the **Younger** abstention doctrine does indeed apply; that not only is there ongoing state proceedings – not only are there ongoing state proceedings with opportunity to raise these federal claims, because indeed they were raised in the Colorado Supreme Court, but there are important state interests, more than one, as pointed out.

However, in addition to the **Younger** case, I think that this case falls within the **Parsons Steel** doctrine. And the fact that where a state court makes a decision on

res judicata as stated by **Parsons Steel** – and I want to given the cite on that, too: 414 U.S. 518. On page 524 of that decision, it says that once the state court has finally rejected a claim of *res judicata*, then the Full Faith and Credit Act becomes applicable and federal courts must turn to state law to determine the preclusive effect of the state court's decision.

In **Rael vs. Taylor**, we do have, as I've indicated, extensive consideration of whether the lower decision on *res judicata* should be upheld. And on page 1229 of the **Rael** decision, the Supreme Court of Colorado says the following: [37] First of all, it says that the judgment of the Court of appeals is affirmed insofar as it upheld the trial court's denial of attorney's fees. Then it goes on to say that it's reversed insofar as it held the petitioner's claims are barred by the doctrine of *res judicata*; so to that extent, the Colorado Supreme Court is making a ruling reversing a lower court holding that claims were barred by *res judicata* and then of course sending the case down to be determined concerning these reasonably ascertainable persons with identifiable interests.

The Court's view is that both under the **Parsons Steel** doctrine and under **Younger**, this court should not interfere with what has been ruled on by the Colorado Supreme Court; and accordingly, the motion to dismiss the complaint will be granted at this time and the complaint will be dismissed so that the state proceeding can proceed.

The motion for preliminary injunction therefore is moot.

Is there anything else that either side would like to have put on the record?

MR. WOLF: Thank you, your Honor.

MR. GORDON: Thank you, your Honor.

THE COURT: Thank you. And I hope maybe there can be some efforts at this point among the attorneys to see if there can be there can be something that can be worked out between the parties. If not, then I have great confidence in the state [38] court system.

* * *

APPENDIX C

SUPREME COURT OF THE UNITED STATES

Zachary TAYLOR, Executor of the Estate of Jack T. Taylor, Jr., Deceased, et al,
petitioners,
v.
Charlie JAQUEZ, Jr., et al.

No. 97-1132

March 9, 1998.

Petition for writ of certiorari to the United States Court of Appeals for the Tenth Circuit denied.